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Federal Jurisdiction -- Removal of Suits Instituted in State Courts Under the Fair Labor Standards Act

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a witness to give an opinion as to the speed of a vehicle based alone on its sound in motion,¹⁶ or the sound of a collision.¹⁷ However, the Missouri court has held it proper to allow an expert to give an opinion as to the speed of an automobile based upon such data.¹⁸

No general determination can be made as to the minimum sufficiency of data necessary to support an opinion. This question must be passed upon first by the trial court in the light of the circumstances of each case and is reviewable as a question of law. No case has been found which upholds the admissibility of an opinion based upon data so scant as that in the principal case.

Sometime in the future there may be developed a scientific technique which can provide a method for the estimation of speed based upon data even as meager as that used in the principal case. When this is done it will be time enough to re-examine the rule of evidence which now excludes such estimations.

CYRUS F. LEE.

Federal Jurisdiction—Removal of Suits Instituted in State Courts Under the Fair Labor Standards Act

Section 16(b) of the Fair Labor Standards Act, hereinafter abbreviated as F. L. S. A., provides that employee suits for the recovery of unpaid minimum wages or overtime compensation "may be maintained in any court of competent jurisdiction."¹ Section 24(8) of the Judicial Code provides that regardless of diversity of citizenship or the sum in controversy the district courts of the United States shall have jurisdiction over "all suits . . . arising under any law regulating commerce."² Section 28 of the Judicial Code provides that "Any suit of a civil nature . . . arising under the Constitution or laws of the United States . . . of which the district courts of the United States are given original jurisdiction . . . may be removed by the defendant . . . to the district courts."³

In *Sweetman et al. v. Remington Rand*⁴ plaintiff employee brought action to recover alleged overtime compensation, liquidated damages, reasonable attorneys' fees and costs under the F. L. S. A. Action was removed from the state court in which it was commenced. Plaintiff moves to remand on ground that Congress intended to amend the Re-

¹⁶ *Law v. Gallagher*, 9 Harr. (Del.) 189, 197 Atl. 479 (1938); *Challinor v. Axton*, 246 Ky. 76, 54 S. W. (2d) 600 (1932); *Park v. Gandio*, 286 Mich. 133, 281 N. W. 565 (1935); *Lambach v. Colley*, 283 Pa. 366, 129 Atl. 88 (1925).

¹⁷ *Knoche v. Pease Seed and Grain Co.*, 134 Neb. 130, 277 N. W. 798 (1938); *Mierendorf v. Soalfeld*, 138 Neb. 876, 295 N. W. 901 (1941).

¹⁸ *Murphy v. Cole*, 338 Mo. 13, 88 S. W. (2d) 1023 (1935).

¹ 52 STAT. 1069 (1938), 29 U. S. C. A. §216(b).

² 36 STAT. 1092 (1913), 28 U. S. C. A. §41(8).

³ 36 STAT. 1094 (1914), 28 U. S. C. A. §71.

⁴ 65 F. Supp. 940 (S. D. Ill. 1946).

removal Statute⁵ by excepting from the provisions thereof any case by employees against their employers which arise under the F. L. S. A. *Held*, motion denied. In a similar action the court in *Young v. Arbyrd Compress Co.*⁶ granted the motion.

While it is well established that original jurisdiction of cases arising under the F. L. S. A. is concurrent in both federal and state courts,⁷ the question whether an action once commenced in the state court may be removed to a federal district court has been decided both ways as the two principle cases illustrate. There are no decisions on the point by either the Supreme Court or the circuit courts of appeal.⁸ In Volume 65 of the Federal Supplement there are four cases denying a motion to remand and five granting such a motion.⁹

The confusion stems from the unfortunate wording of the Act providing that an employee's action "may be *maintained*¹⁰ in any court of competent jurisdiction." While some of the early cases remanding the suit to the state courts were decided on the ground that a suit does not "arise under a law of the United States" within the meaning of the Removal Statute unless the construction or effect of the law is in dispute;¹¹ *i.e.*, no federal question presented, the more recent decisions denying removal refute this view.¹² These latter decisions along with

⁵ See note 3 *supra*.

⁶ 66 F. Supp. 241 (E. D. Mo. 1946).

⁷ *Robertson v. Argus Hosiery Mills*, 121 F. (2d) 285 (C. C. A. 6th, 1941), *cert. denied*, 314 U. S. 681 (1941); *Hart v. Gregory*, 218 N. C. 184, 10 S. E. (2d) 644 (1940).

⁸ An appeal from an order remanding a suit to the state court in which it was instituted is denied by the Removal Statute, 28 U. S. C. A. §71.

⁹ Cases cited, note 13 *infra*.

¹⁰ Italics author's.

¹¹ Unreported decisions are not listed in this note. For a partial list see *Swettman et al. v. Remington Rand*, 65 F. Supp. 940 (S. D. Ill. 1946).

Stewart v. Hickman, 36 F. Supp. 861 (W. D. Mo. 1941) (Reeves, J.), noted (1941) 6 Mo. L. Rev. 519; 9 KAN. CITY L. REV. 227; *Kuligowski v. Hart*, 43 F. Supp. 207 (N. D. Ohio 1941); *Phillips v. Pucci*, 43 F. Supp. 253 (W. D. Mo. 1942) (Reeves, J.), noted (1942) 9 U. OF CHI. L. REV. 742; *Booth v. Montgomery Ward & Co.*, 44 F. Supp. 451 (D. Neb. 1942) (in part only; also relies on construction of the word "maintained," see note 13 *infra*); *Brockway v. Long*, 55 F. Supp. 79 (W. D. Mo. 1944) (Reeves, J.); *Adams v. Long et al.*, 65 F. Supp. 310 (W. D. Mo. 1943) (Reeves, J.). This position is based upon Justice Cardozo's statement in *Gully v. First National Bank*, 299 U. S. 109, 114 (1936) where he stated: "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends." An excellent discussion criticizing the application of this rule in cases where the action arises only because of a right granted by a federal law will be found in (1942) 9 U. OF CHI. L. REV. 742 commenting on the rule's application in *Phillips v. Pucci*, *supra*, and will not be dealt with here.

¹² *Young v. Arbyrd Compress Co.*, 66 F. Supp. 241, 242 (E. D. Mo. 1946) ("Some of the cases hold that there is no real question involving interpretation of a Federal Statute. With these we are not in accord. Unless the language of the Fair Labor Standards Act prevents removal, we think such cases would be removable as cases arising under a law regulating interstate commerce."). *Brantley v. Augusta Ice & Coal Co.*, 52 F. Supp. 158 (S. D. Ga. 1943).

all the cases granting removal base their conclusions upon the judge's interpretation of the word "maintained."¹³

Two Supreme Court decisions¹⁴ in another connection defined the word: "To maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun."¹⁵ These decisions have been heavily relied on by district courts denying removal¹⁶ despite the fact that in neither case was the Supreme Court construing the word in relation to an implied amendment of the Removal Statute. Judge Hulén in *Young*

¹³ *Decisions denying removal due to construction of word "maintained":*

Wingate v. General Auto Parts Co., 40 F. Supp. 364 (W. D. Mo. 1941) (Otis, J.), noted (1942) 55 HARV. L. REV. 541, 36 ILL. L. REV. 787, (1941) 26 MINN. L. REV. 134; *Booth v. Montgomery Ward & Co.*, 44 F. Supp. 253 (D. Neb. 1942); *Duval v. Protes*, 51 F. Supp. 967 (E. D. N. Y. 1943) (Campbell, J.); *Brantley v. Augusta Ice & Coal Co.*, 52 F. Supp. 158 (S. D. Ga. 1943); *Sheridan v. Leitner* (S. D. N. Y. 1944) (Bondy, J.) (case reversed *Sheridan v. Leitner*, 44 N. Y. S. (2d) 570 (1943) and did not mention *contra* opinion of Judge Hulbert in *McCarrige v. 11 W. Forty Second St. Corp.*, 48 F. Supp. 710 (S. D. N. Y. 1942) upon which the New York trial judge based his decision allowing removal); *Steiner v. Pleasantville Construction, Inc.*, 59 F. Supp. 1011 (S. D. N. Y. 1944) (Goddard, J.); *Tobin v. Hercules Powder Co.*, 63 F. Supp. 434 (D. Del. 1945); *Smith v. Day & Zimmerman, Inc.*, 65 F. Supp. 209 (S. D. Iowa 1946); *Wright v. Long et al.*, 65 F. Supp. 279 (W. D. Mo. 1944) (Otis, J.); *Apple v. Shulman Publications, Inc.*, 65 F. Supp. 677 (D. N. J. 1943) (Smith, J.) (no mention whatsoever made of Judge Fake's strong often quoted *dicta* in favor of removal in *Ricciardi v. Lazzara Baking Corp.*, 32 F. Supp. 956 (D. N. J. 1940); *Young v. Arbyrd Compress Co.*, 66 F. Supp. 241 (E. D. Mo. 1946); *McLendon v. Beddingfield*, 38 S. E. (2d) 66 (Ga. App. 1946).

Decisions granting removal:

Ricciardi v. Lazzara Baking Corp., 32 F. Supp. 956 (D. N. J. 1940) (really *dicta* as case remanded due to failure of defendant to file removal petition within time specified for filing answer by New Jersey statute); *Owens v. Greenville News-Piedmont Corp.*, 43 F. Supp. 785 (W. D. S. C. 1942); *McCarrige v. 11 W. Forty Second St. Corp.*, 48 F. Supp. 710 (S. D. N. Y. 1942) (Hulbert, J.); *Harris v. Reno Oil Co.*, 48 F. Supp. 908 (N. D. Tex. 1943); *Cox v. Gatliff Coal Co.*, 52 F. Supp. 482 (E. D. Ky. 1943), noted (1944) 7 U. OF DER. L. J. 96 and 42 MICH. L. REV. 1138, *aff'd but question of removal not raised*, 142 F. (2d) 876 (1944); *Sonnesyn v. Federal Cartridge Co.*, 54 F. Supp. 29 (D. Minn. 1944) (Joyce, J.), noted in (1945) 43 MICH. L. REV. 814; *Koskala v. Butler Bros.*, 65 F. Supp. 276 (D. Minn. 1946) (Donovan, J.); *Johnson v. Butler Bros.*, 65 F. Supp. 277 (D. Minn. 1946); *Ellems v. Helmers, Inc. et al.*, 65 F. Supp. 566 (E. D. N. Y. 1944) (Abruzzo, J.) ("Whatever discretion there might be . . . lies with the court to whom the petition for removal is presented."); *Swettman et al. v. Remington Rand*, 65 F. Supp. 940 (S. D. Ill. 1946); *Mengel v. Ishee*, 192 Miss. 366, 4 So. (2d) 878 (1941); *Sheridan v. Leitner*, 44 N. Y. S. (2d) 570 (1943); *rev'd*, *Sheridan v. Leitner*, 59 F. Supp. 1011 (S. D. N. Y. 1944).

One case fits in neither category. *Garner v. Mengel Co.*, 50 F. Supp. 794, 796 (W. D. Ky. 1943) (remanded because of the rule "that where the question of remand is doubtful the doubt should be resolved in favor of remanding the action to the state court"). *Contra*, *Cox v. Gatliff Coal Co.*, 52 F. Supp. 482, 485 (E. D. Ky. 1943) (the rule "not applicable where decision upon motion to remand requires interpretation of an act of Congress").

¹⁴ *Smallwood et al. v. Gallardo*, 275 U. S. 56 (1927) (construction of 1927 amendment to act providing civil government for Puerto Rico which provided "that no suit for purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the district court of the United States for Puerto Rico." 48 U. S. C. A. §872); *Moore Ice Cream Co. v. Rose*, 289 U. S. 373 (1933) (suit to recover taxes under statute authorizing taxpayer to maintain a suit to recover tax, irrespective of protest. REV. ACR 1924 §1014. 43 STAT. 343). Neither involved any question pertaining to removal.

¹⁵ *Smallwood et al. v. Gallardo*, 275 U. S. 56, 61 (1927); *Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 377 (1933).

v. Arbyrd Compress Co. states: "If we consider the definition of the term given in Webster¹⁷ and the opinions of the Supreme Court, we cannot give it such a restricted meaning as only 'to commence.'"¹⁸

This point is partially parried by district courts allowing removal by citing 36 *Corpus Juris* 336¹⁹ containing decisions "holding that maintained is synonymous with 'commenced.' In fact so many different and conflicting constrictions appear to have been given the word . . . that its character for exactitude of meaning is badly damaged."²⁰

Another way of arguing that maintain means to uphold, etc., is to state that since the state courts, in the absence of an express prohibition by Congress, are already courts of competent jurisdiction wherein the suit could be commenced, the use of "maintained" is meaningless unless it be interpreted to mean "carried through to final judgment."²¹ However, Judge Briggles believes that Congress meant by Section 16(b) not to fix the place *where* the suit might be brought but to provide *who* might bring it.²² Thus he concludes "A construction denying removal

¹⁶ *Booth v. Montgomery Ward & Co.*, 44 F. Supp. 451 (D. Neb. 1942); *Garner v. Mengel Co.*, 50 F. Supp. 794 (W. D. Ky. 1943); *Brantley v. Augusta Ice & Coal Co.*, 52 F. Supp. 158 (S. D. Ga. 1943); *Sheridan v. Leitner*, 59 F. Supp. 1011 (S. D. N. Y. 1944); *Steiner v. Pleasantville Construction, Inc.*, 59 F. Supp. 1011 (S. D. N. Y. 1944); *Young v. Arbyrd Compress Co.*, 66 F. Supp. 241 (E. D. Mo. 1946).

¹⁷ *Young v. Arbyrd Compress Co.*, 66 F. Supp. 241, 242 (E. D. Mo. 1946) ("To continue or persevere in or with; to carry on; as to maintain an attack, a correspondence, a legal action.").

¹⁸ *Id.* at 243.

¹⁹ For many other conflicting definitions of the word "maintained" see 26 WORDS & PHRASES, PERM. ED. 58 to 60, and 1946 SUPP. 8 to 10. See also (1942) 14 *Miss. L. J.* 157.

²⁰ *Ricciardi v. Lazzara Baking Corp.*, 32 F. Supp. 956, 958 (D. N. J. 1940).

²¹ This was the first point plaintiff relied on in support of his motion to remand in *Swettman v. Remington Rand*, cited *supra* note 4. This view was adopted in: *Wingate v. General Auto Parts Co.*, 40 F. Supp. 364 (W. D. Mo. 1941); *Fredman v. Foley Bros.*, 50 F. Supp. 161 (W. D. Mo. 1943); *Brantley v. Augusta Ice & Coal Co.*, 52 F. Supp. 158 (S. D. Ga. 1943); *Sheridan v. Leitner*, 59 F. Supp. 1011 (S. D. N. Y. 1944); *Smith v. Day & Zimmerman, Inc.*, 65 F. Supp. 209 (S. D. Iowa 1946); *Young v. Arbyrd Compress Co.*, 66 F. Supp. 241 (E. D. Mo. 1946). *Contra*: *Cox v. Gatliff Coal Co.*, 52 F. Supp. 482, 484 (E. D. Ky. 1943) ("Argument . . . is not impressive." Judge Ford states that since the Act provides for recovery not only of unpaid wages but also an additional equal amount plus reasonable attorneys' fees and Section 256 of the Judicial Code, 28 U. S. C. A. §371, vests exclusive jurisdiction in the courts of the United States "of all suits for penalties and forfeitures incurred under the laws of the United States" "it was obviously the purpose of Congress to dissipate any doubts as to the right and duty of state courts to entertain jurisdiction of suits arising under the Act, even though the extra recovery authorized should be judicially determined to be in the nature of a penalty or forfeiture within the meaning of Section 256 of the Judicial Code."). While this allowance under the Act for extra recovery was construed in *Robertson v. Argus Hosiery Mills*, 121 F. (2d) 285 (C. C. A. 6th, 1941) not to be a penalty, see *Mengel Co. v. Ishee*, 192 *Miss.* 366, 4 *So.* (2d) 878 (1941), where the dissenting judge entertained just such a fear. See also (1941) 19 *N. C. L. Rev.* 251, 258.

²² *Swettman et al. v. Remington Rand*, 65 F. Supp. 940, 944 (S. D. Ill. 1946) ("From such examination of the legislative history and from an examination of the Statute as finally enacted it is not reasonable to suppose that Congress had any intention of amending the Removal Act. A reading of the entire Section 16(b)

gives undue prominence to the word 'maintained' and accords to it a strained meaning not intended by the lawmakers and requiring an implied amendment of the Removal Act. I conclude that the Fair Labor Standards Act neither amends the Removal Act nor excepts therefrom cases arising under the Fair Labor Standards Act."²³

A supporting point advanced in *Young v Arbyrd Compress Co.* is that the "trend of recent decisions is to reduce federal jurisdiction by a strict construction of the Removal Statute."²⁴

A collateral point used in granting removal by way of rebuttal to the above is that Congress has specifically amended the Removal Act²⁵ when such action was the Congressional intent.

Congressional intent to aid the employees by passage of the F. L. S. A. is invoked by district courts denying removal on the basis that employee interest is best served if cases are completely disposed of in conveniently located state courts.²⁶ The court in the *Swettman* case, however, after carefully considering the legislative history of the Act states: "Nothing

clearly shows that in inserting this section Congress was not intending to fix the place *where* such a suit could be brought or prosecuted to a final judgment but was concerned only with providing *who* might prosecute the suit and in what name the suit would be brought.). See note (1941) 19 N. C. L. Rev. 251 for a discussion of the legislative history of the Act.

²³ *Swettman et al. v. Remington Rand*, 65 F. Supp. 940, 944 (S. D. Ill. 1946).

²⁴ See also *Brantley v. Augusta Ice & Coal Co.*, 52 F. Supp. 158 (S. D. Ga. 1943). But see *Swettman et al. v. Remington Rand*, 65 F. Supp. 940, 943 (S. D. Ill. 1946) ("It must be conceded [that such a policy to limit jurisdiction] set forth sound reasons why perhaps Congress *should have* excepted these cases from the Removal Act. But the question . . . is solely what Congress did actually do.").

²⁵ Federal Employers Liability Act, 52 STAT. 1404 (1939), 45 U. S. C. A. §56 provides: "The jurisdiction of the courts of the United States . . . shall be concurrent with that of the courts of the several States and no case arising under this chapter and brought in any State court . . . shall be removed to any court of the United States." Removal Statute was also amended to conform. This viewpoint adopted in: *Ricciardi v. Lazzara Baking Corp.*, 32 F. Supp. 956 (D. N. J. 1940); *Owens v. Greenville News-Piedmont Corp.*, 43 F. Supp. 785 (W. D. S. C. 1942); *Cox v. Gatliff Coal Co.*, 52 F. Supp. 482 (E. D. Ky. 1943); *Sonnesyn v. Federal Cartridge Co.*, 54 F. Supp. 29 (D. Minn. 1944); *Swettman et al. v. Remington Rand*, 65 F. Supp. 940, 942 (S. D. Ill. 1946) ("In the past, in every case it has been the policy of Congress when it intended to amend or make exceptions to the Removal Act to do so by express words. . . . There is no apparent reason why Congress should have adopted a new and different course in the passage of the Fair Labor Standards Act if it intended to preclude removal of cases under that Act."). *Contra*: *Fredman Bros., Inc.*, 50 F. Supp. 161, 163 (W. D. Mo. 1943) ("But Congress is bound by no formula. If the meaning is clear. . ."). But see *Young & Jones v. Hiawatha Gin & Mfg. Co.*, 17 F. (2d) 193, 195 (S. D. Miss. 1927). For decision on the Jones Act, 46 U. S. C. A. §688 see *Beckwith v. American President Lines, Ltd.*, 66 F. Supp. 353 (N. D. Cal. 1946).

²⁶ *Wingate v. General Auto Parts Co.*, 40 F. Supp. 364 (W. D. Mo. 1941) (to hold otherwise would defeat the purpose of the Act to give workmen a remedy in a court easily accessible to them). Case criticized in (1942) 55 HARV. L. REV. 541 stating that no such contention can be found in the Congressional debates on the Act; *Booth v. Montgomery Ward & Co.*, 44 F. Supp. 451 (D. Neb. 1942); *Fredman v. Foley Bros.*, 50 F. Supp. 161 (W. D. Mo. 1943); *Tobin v. Hercules Powder Co.*, 63 F. Supp. 434 (D. Del. 1945); *Smith v. Day & Zimmerman, Inc.*, 65 F. Supp. 209 (S. D. Iowa 1946).

in the report²⁷ which indicates any intention to do anything other than permit an employee's suit."²⁸

Closely interwoven with this argument is the desire of the federal judges to avoid crowding the federal docket with many small claims.²⁹ However, a survey of the cases reveals that the amount in controversy has been deemed important in only two decisions.³⁰ Furthermore many cases denying removal have involved amounts over \$3,000,³¹ while in others the amount is not deemed of sufficient importance to even be mentioned in the opinion.³² Judge Briggie states that these ideas are reasons perhaps why Congress "should have excepted these cases" from the Removal Statute, but the question is what Congress actually did.³³

The other companion reason in this line of analogy by district courts remanding suits under the F. L. S. A. to the state courts in which they were started is the avoidance of expensive litigation by the employee.

²⁷ H. R. REP. No. 2738, 75th Cong., 3rd Sess. (1938).

²⁸ *Swettman et al. v. Remington Rand*, 65 Supp. 940, 944 (S. D. Ill. 1946) ("The situation before the conference committee of the two Houses was thus: The Senate Bill provided for suits by employees and gave concurrent jurisdiction to State and Federal Courts; the House Bill contained no provision for employees' suits but conferred jurisdiction on the Federal Courts to enjoin violations of the Act. On June 14, 1938, the conference committee presented a report which contained Sections 16 and 17 of the Act as subsequently enacted. . . . In the conference committee's report to the House recommending the enactment of the Act in its final form appears the following comment regarding Section 16: '. . . This section also provides for civil reparations for violations of the wages and hours provisions. If an employee is employed for less than the legal minimum wage, or if he is employed in excess of the specified hours without receiving the prescribed payment for overtime, he may recover from his employer twice the amount by which the compensation he should have received exceeds that which he actually received.' . . . Nothing appears in the report which indicates an intention to do anything other than permit an employee's suit. The conference committee merely adopted the Senate's view with respect to the allowance of such employee's suit and also the Senate's view as to concurrent jurisdiction as to both State and Federal Courts by using the words 'any court of competent jurisdiction'"). See note 22 *supra*.

²⁹ See note 26 *supra* as the cases discuss these two arguments together.

³⁰ *Harris v. Reno Oil Co.*, 48 F. Supp. 908 (N. D. Tex. 1943) (judge emphasized fact that the district court was in the same city as the state court where action started plus fact that the amount in controversy was \$4,000 and diversity of citizenship was present); *Wright v. Long et al.*, 65 F. Supp. 279 (W. D. Mo. 1944).

³¹ *Fredman v. Foley Bros.*, 50 F. Supp. 161 (W. D. Mo. 1943) (\$19,200 and diversity of citizenship); *Garner v. Mengel Co.*, 50 F. Supp. 794 (W. D. Ky. 1943) (\$4,889 and diversity of citizenship; however, see comment on this case note 13 *supra*); *Brantley v. Augusta Ice & Coal Co.*, 52 F. Supp. 158 (S. D. Ga. 1943) (over \$3,000, but no diversity of citizenship); *Steiner v. Pleasantville Construction, Inc.*, 59 F. Supp. 1011 (S. D. N. Y. 1944) (over \$3,000 and diversity of citizenship).

³² *Kuligowski v. Hart*, 43 F. Supp. 207 (N. D. Ohio 1941); *Duval v. Protes*, 51 F. Supp. 967 (E. D. N. Y. 1943); *Smith v. Day & Zimmerman, Inc.*, 65 F. Supp. 209 (S. D. Iowa 1946); *Apple v. Shulman Publications*, 65 F. Supp. 677 (D. N. J. 1943).

³³ See comment on *Swettman* case note 24 *supra*. *McCarrigle v. 11 Forty Second St. Corp.*, 48 F. Supp. 710, 711 (S. D. N. Y. 1942) ("While I realize" that such a decision "is likely to bring to this court a considerable number of cases, many of which could be brought and disposed of in local courts with less inconvenience to the litigants . . . until Congress shall amend the statute . . . I feel constrained to follow" the cases granting removal.).

However, this point is weakened by the provision of the Act which allows the employee to recover, in addition to double his unpaid minimum wages, a reasonable attorney's fee.³⁴

Other miscellaneous points considered include the recitations of the rule that courts should not interpret a statute so as to make parts of it surplusage unless no other construction is available.³⁵ *Contra* decisions counter with the rule that a partial repeal of the Removal Statute by implication is not favored.³⁶

One excellent argument for the state court's retention of the suit once it is commenced in that court which has not been heavily seized upon is the fact that in the same sentence with the much discussed "may be maintained in any court of competent jurisdiction" is a provision that "employees may designate an agent or a representative to *maintain*³⁷ such an action." As obviously Congress meant that the designated representative might continue the suit to completion, these decisions believe that the same interpretation should be given the word "maintain" throughout, thereby attaching continuity.³⁸

Since the point is very close there are naturally excellent arguments on both sides of the question. However, it is submitted despite the numerical weight of the decision *contra* that the better reasoned decisions are those granting removal. In view of the lack of any express evidence of a Congressional intent that the multi-meaning word "maintained" did in the F. L. S. A. mean to carry the suit through to completion³⁹ the more reasonable view is that no amendment to the Removal Statute was meant or implied.

Yet, due to the lack of uniformity in the decisions within the same state⁴⁰ and even within the same federal district,⁴¹ in order to preserve

³⁴ Fair Labor Standards Act, 52 STAT. 1069 (1938), 29 U. S. C. A. §216(b). "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fees to be paid by the defendant, and costs of the action."

³⁵ *Brantley v. Augusta Ice & Coal Co.*, 52 F. Supp. 158 (S. D. Ga. 1943); *Smith v. Day & Zimmerman, Inc.*, 65 F. Supp. 209 (S. D. Iowa 1946); *Young v. Arbyrd Compress Co.*, 66 F. Supp. 241 (E. D. Mo. 1946).

³⁶ *Ricciardi v. Lazzara Baking Corp.*, 32 F. Supp. 956, 958 (D. N. J. 1940); *Owens v. Greenville News-Piedmont Corp.*, 43 F. Supp. 785 (W. D. S. C. 1942); *Garner v. Mengel Co.*, 50 F. Supp. 794 (W. D. Ky. 1943); *Sonnesyn v. Federal Cartridge Co.*, 54 F. Supp. 29 (D. Minn. 1944); *Swettman et al v. Remington Rand*, 65 F. Supp. 940 (S. D. Ill. 1946). *Contra*: *Fredman v. Foley Bros.*, 50 F. Supp. 161 (W. D. Mo. 1943) (see comment on case in note 25 *supra*); *Smith v. Day & Zimmerman, Inc.*, 65 F. Supp. 209 (S. D. Iowa 1946); *Young v. Arbyrd Compress Co.*, 66 F. Supp. 241, 243 (E. D. Mo. 1946) ("The removal statute has not been repealed. It still stands. We simply hold it not applicable to cases of the character (F. L. S. A.) before the court.").

³⁷ *Italics author's.* 52 STAT. 1069 (1938), 28 U. S. C. A. §216(b).

³⁸ *Fredman v. Foley Bros.*, 50 F. Supp. 161 (W. D. Mo. 1943); *Brantley v. Augusta Ice & Coal Co.*, 52 F. Supp. 158 (S. D. Ga. 1943); *Steiner v. Pleasantville Construction, Inc.*, 59 F. Supp. 1011 (S. D. N. Y. 1944).

³⁹ See notes 22, 25, and 28 *supra*.

⁴⁰ Cases denying removal are listed first. *Garner v. Mengel Co.*, 50 F. Supp. 161 (W. D. Ky. 1943). *Contra*: *Cox v. Gatliff Coal Co.*, 52 F. Supp. 482 (E. D.

needed order and respect for the judicial system, Congressional action seems imperative. It is submitted that Congress should, in addition to scrupulously abstaining from the future use of the word "maintained" without a clear cut definition, reword Section 16(b) of the Fair Labor Standards Act to dispel all of the current confusion which has attached to the problem of whether suits brought in state courts under the F. L. S. A. are removable to federal district courts or not. The F. L. S. A. is certain to come under Congressional scrutiny in connection with the now famous portal to portal question⁴² and such a rewording of Section 16(b) could be advantageously accomplished at the same time. A workable standard may be found in the eighth sentence of Section 28 of the Judicial Code⁴³ which permits removal of suits against common carriers under the Interstate Commerce Act⁴⁴ only when they involve more than \$3,000. This would provide sufficient federal decisions to which state courts could look for guidance thereby avoiding too many jurisdictional inconsistencies.

NOEL R. S. WOODHOUSE.

Insurance—Extension of Coverage by Waiver or Estoppel

Plaintiff insurer sought a declaratory judgment to determine its liability on an automobile liability policy. The policy contained the following: "This policy does not apply: (a) while the automobile is used as a public or livery conveyance. . . ." There was also a clause limiting the agent's power with respect to waiver and estoppel. Answering two issues submitted to it, the jury found (1) the automobile was used as a public conveyance, and (2) the agent knew it was to be so used when he issued the policy. Defendant abandoned a plea for reformation. The trial court disregarded the second issue and gave judgment for plaintiff. On appeal the Supreme Court affirmed, holding the submission of the second issue was inadvertent as it rested upon parol evidence which

Ky. 1943). See comment note 13 *supra* on these two cases. *Barron v. F. H. E. Oil Co.*, 4 Wage & Hour Rep. 551 (W. D. Tex. 1941). *Contra: Harris v. Reno Oil Co.*, 48 F. Supp. 908 (N. D. Tex. 1943). See also cases listed in note 41 *infra*.

⁴¹ Cases denying removal are listed first. *Apple v. Shulman Publications*, 65 F. Supp. 677 (D. N. J. 1943). *Contra: Ricciardi v. Lazzara Baking Corp.*, 32 F. Supp. 956 (D. N. J. 1940) (really a dictum, however, cited both pro and con often). *Duval v. Protes*, 51 F. Supp. 967 (E. D. N. Y. 1943). *Contra: Ellems v. Helmers, Inc.*, 65 F. Supp. 566 (E. D. N. Y. 1944). *Sheridan v. Leitner*, 59 F. Supp. 1011 (S. D. N. Y. 1944). *Contra: McCarrigle v. 11 W. Forty Second St. Corp.*, 48 F. Supp. 710 (S. D. N. Y. 1942). In each of these cases the judges were different and in the later of the two in each district the judge did not bother to distinguish or overrule the previous *contra* decisions.

⁴² N. Y. Times, Dec. 29, 1946, §E, p. 3, col. 3.

⁴³ 36 STAT. 1094 (1914), 28 U. S. C. A. §71.

⁴⁴ 41 STAT. 474 (1920), 49 U. S. C. A. §1 *et seq.*